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No. 00-1192

IN THE

Supreme Court of the United States

FRANK SMITH AND CONNIE TYREE, *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

The Government's Brief in Opposition is riddled with misstatements of the law, distortions of the record, and internal inconsistencies so numerous that they cannot all be addressed within the limitations prescribed by S. Ct. R. 33. We deal in this Reply only with the most significant errors.

I. The Selective Prosecution Claim

Petitioners claim that they were singled out for prosecution on the basis of their race and political affiliation. Applying the standard announced by this Court in *United States v. Armstrong*, 517 U.S. 456 (1996), a Magistrate Judge concluded they were entitled both to discovery and to an evidentiary hearing. At the end of that hearing, he found that it was "*certainly* true that there [was] evidence in the record indicating that other people [had] engaged in fraudulent absentee-ballot voting activities, including forging voters' signatures and altering ballots." App. 57 (emphasis added). But both the Magistrate Judge and the Court of Appeals then advanced novel and unsupportable formulations of the legal standards to be applied to claims of selective prosecution[1] that conflict both with the decisions of other courts of appeals (as the Government's Brief in Opposition concedes) and with rulings of this Court (which the Government denies).

A. *The Burden of Proof Question*

This Court has explicitly ruled that "ordinary equal protection standards" govern selective-prosecution claims. *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Armstrong*, 517 U.S. at 465. Among those standards is the burden of

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[1]Petitioners also seek review of the Court of Appeals' similarly unprecedented reading of the Sentencing Guidelines provisions applicable to these prosecutions. See Pet. at 25-27.

proof. There are two aspects to the burden of proof: its location and its weight. The location indicates which party loses if the burden is not met. The weight describes how persuasive the evidence must be in order to satisfy the burden. Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1301 (1977). Petitioners and the Government agree on the location of the burden of proof in a selective-prosecution case: it rests on the defendant who alleges selective prosecution. Where we differ is on the weight of the burden a defendant must bear.

There are three distinct burdens of proof that might apply to a legal claim: proof by a preponderance of the evidence; proof by clear and convincing evidence; and proof beyond a reasonable doubt. *See Addington v. Texas*, 441 U.S. 418, 423 (1979). This Court has made it crystal clear that "'[p]reponderance of the evidence' and 'clear and convincing evidence' describe well known, contrasting standards of proof." *Allentown Mack Sales & Service v. N.L.R.B.*, 522 U.S. 359, 376 (1998).

The Government is unable to point to a single case in any area of equal protection law in which any court has required any claimant to prove a violation by clear and convincing evidence. Indeed, even in *McCleskey v. Kemp*, 481 U.S. 279 (1987), the case on which the Government relies, Br. Opp. 17, the Supreme Court did not "hold" (as the Government suggests, *id.* at 17-18) in affirming the lower court's judgment, that a burden of proof higher than the preponderance standard applied to McCleskey's equal protection claim. The statement quoted by the Government is *dictum*, at best, and the phrase "clear and convincing" appears nowhere in either the Supreme Court's opinion nor in that of the district court whose judgment it approves.

The Government acknowledges, as it must, that the Ninth Circuit, in clear conflict with the decision in this case, has announced that the proper burden of proof in a selective-prosecution case is proof by a preponderance. *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992), *appeal after remand sub nom. United States v. Alcaraz-Peralta*, 27 F.3d 439 (9th Cir. 1994). All the Government can say is that *Redondo-Lemos*, and the other cases the Petitioners cite, in which courts of appeals have applied the preponderance of the evidence standard to judge claims of equal protection violations by prosecutors or other law enforcement officials, were decided before *Armstrong*. Br. Opp. 18. But *Armstrong* announced no change in the pre-existing law. On the relevant question, it quotes *Wayte*, which was decided nearly a decade *before* the cases with which the holding below is in conflict.

The reason no court has ever adopted the Government's position becomes obvious if one considers the purpose of burdens of proof. As the Court explained in *Addington*,

> adopting a "standard of proof is more than an empty semantic exercise." In cases involving individual rights, whether criminal or civil, "[the] standard of proof [at a minimum] reflects the value society places on individual liberty."

418 U.S. at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972)) (interpolations in the original).

In what sorts of selective-prosecution cases would the standard of proof make a difference? Only in cases where the burden-bearing party has satisfied one standard but fails a higher one. Put plainly, the Government wants this Court to leave intact a ruling that federal courts should allow prosecutions to proceed even if they have found, as a fact, that

it is more likely than not that the government chose to prosecute a defendant because of the defendant's race, political affiliation, or exercise of constitutional rights. To state the proposition accurately is to show its utter constitutional repugnance.

B. *The "Similarly Situated" Requirement*

The Brief in Opposition never really engages Petitioners' arguments regarding the Court of Appeals' misapplication of the "similarly situated" requirement. Our central point was quite simple: the Court of Appeals adopted an unconscionably stringent definition of the word "similarly." That definition allowed the Court of Appeals to ignore completely the unchallenged evidence in the record regarding other individuals who engaged in the same activities as petitioners and to hold—to take only one egregious example—that Petitioner Smith, who was convicted with regard to irregularities concerning *three* voters' ballots, was not similarly situated to individuals who engaged in the same kind of behavior with respect to *two* voters' ballots.

The Government's attempt to rehabilitate this absurd standard falls flat. It begins by claiming that "we do not know from the record the strength of the evidence that others may have committed similar crimes." Br. Opp. 19 (quoting Pet. App. 20). But before the Court of Appeals' decision in this case, no court had ever held that defendants must show not only that there are similarly situated individuals, but also "that the evidence [against those individuals] was as strong or stronger than that against the defendant." Pet. App. 16.

Given that the Government's own contention at the selective prosecution hearing was that *its* investigations were "on-going" and that Petitioners were "but the first in a series of people yet to be indicted and prosecuted," Pet. App. 57, it would be deeply unfair—if not impossible—to require that defendants be able to put on a full-dress criminal prosecution

with regard to similarly situated individuals at the pre-trial selective prosecution hearing.

Moreover, the requirement is incapable of satisfaction. How a defendant is to make a comparative showing, pretrial, before he knows or can assess the strength of the government's case *against him*, is entirely unclear. And even if a defendant is given sufficient discovery to identify similarly situated individuals, it strains credulity to expect that such discovery would include access to prosecutorial assessments of the relative strength of potential cases against the defendants and others.

Finally, defendants of course lack any power to immunize witnesses; thus, they cannot, for example, compel testimony from allegedly similarly situated individuals to prove that those individuals engaged in similar conduct.

Even more disturbing is the Government's offhanded attempt to explain why Petitioners were so uniquely situated that their prosecution was especially justified: "petitioners were public figures (Smith was a candidate for office and Tyree was the deputy county registrar)." Br. Opp. 19-20. Absolutely *nothing* in the record suggests that the prosecutors who brought this case relied on Smith's candidacy, or Tyree's being a deputy registrar, as the reason for bringing this prosecution. This is pure and utter after-the-fact speculation dreamed up by government attorneys sitting in Washington, D.C. about what motivated government lawyers in Alabama.

Even worse, the assertion seriously misrepresents the record. Petitioner Tyree was *not* "*the* deputy county registrar," a characterization that makes it sound as if Tyree were a high-level official in the registrar's office. Not at all. The Government's own witness, Joyce Langham, an employee of the Greene County Board of Registrars, when asked about the existence of deputy registrars not only named eleven individuals (including Rosie Carpenter, one of the people

whom Petitioners alleged was a similarly situated individual), but then made clear that there were a number of others whose names she could not even recall. She also testified that the position was essentially a volunteer job that simply involved helping individuals in the community to register. Tr. 298-99.

C. *Relationship of the Improper "Similarly Situated" Standard to the Discriminatory Purpose Prong*

The Government argues that even if the courts below completely misconstrued the "similarly situated" requirement, this Court should deny certiorari because the Court of Appeals' holding that Petitioners failed to prove a discriminatory purpose provides an alternative basis for rejection of our claim. Br. Opp. 20-21. This argument rests on two fundamental misunderstandings. First, the Petition raises the question whether the Court of Appeals applied the wrong legal standard to Petitioners' argument regarding discriminatory purpose. See Pet. i (Question Presented 1.a.). If Petitioners prevail on that issue, we will be entitled to reconsideration by the Court of Appeals of the evidence we presented regarding the discriminatory motivations behind the prosecution.

Second, the mistakes of the courts below in assessing the evidence of discriminatory impact also infected their assessment of the allegation of discriminatory purpose. Had the Court of Appeals properly recognized the presence of similarly situated individuals—individuals whom the record showed were white or black members of the white-dominated CBGC political faction opposing Petitioners' organization—it would then have been compelled to ask the question why the Government did not prosecute any of these other people. This evidence of non-prosecution would have cast the other evidence of discriminatory purpose that Petitioners presented

in a substantially different light.[2]

II. The Court of Appeals' Elision of the Requirement of Demonstrating Lack of Voter Consent to Prove a Violation of 42 U.S.C. §§ 1973i(c) and 1973i(e)

At trial, on appeal—and at least until the end of the Brief in Opposition's statement of facts—the gravamen of the Government's case was that Petitioners were involved in a scheme to apply for and cast absentee ballots in the names of seven voters *without those voters' consent.* Indeed, the Government was so keen on proving this lack of consent that it impeached two of the six so-called "victim voters" by relying on their grand jury testimony when they testified at trial that they had expressly consented to Petitioners' acts. See Pet. at 7. And it went so far as to threaten a defense witness with prosecution for perjury because she had testified at the selective-prosecution hearing that she had signed the ballot affidavit of her illiterate father (a voter whose ballot application Tyree had signed) with his express consent. See

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[2]Here, too, the Government seriously misrepresents the record. It euphemistically refers to the prosecutor's *Batson* violation—which sheds light on the motivation behind the prosecution since one of Petitioners' arguments was that the federal prosecution in this case was explicable as reflecting in part the state government's desire to try Petitioners in front of a largely white jury pool—as "the district court's rejection of the government's race-neutral explanation for one peremptory challenge because the district court 'did not agree with the government's observation.'" Br. Opp. (quoting Pet. App. 22.). In fact, in overturning the prosecutor's use of a peremptory challenge, the district judge—who after all was physically present to weigh the credibility of the prosecutor's explanation—necessarily concluded that the Government's explanation was a "pretext for purposeful discrimination," *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

Pet. at 8-9, 27-28. But the Court of Appeals held that lack of consent was not a required element of a violation of 42 U.S.C. § 1973i, a position the Government now adopts despite its inconsistency with both its own trial strategy and with the approach taken by every other court of appeals to have addressed the issue.

The Court of Appeals' decision in this case marks the first time any court has ever affirmed a defendant's conviction under 42 U.S.C. §§ 1973i(c) or 1973i(e) without explicitly finding that the defendant acted without the nominal voter's consent. The Brief in Opposition seeks to obfuscate this point by raising a complete straw man—suggesting that Petitioners are somehow arguing that a "defendant's provision of false information to establish another voter's eligibility to vote would be excused if that voter consented to the provision of such false information." Br. Opp. 22.

Petitioners suggested nothing of the sort. The Government's argument reflects the casuistical definition of "false information" most clearly propounded by the Court of Appeals in discussing Count 13 of the indictment, which charged petitioner Tyree with respect to Shelton Braggs' ballot affidavit. The Government did not call Braggs as a witness. Thus, there was literally *no* evidence of nonconsent in the record.[3] Nonetheless, because under Alabama law, "[a] voter cannot legally authorize or direct another to vote his ballot in his place[, Tyree] . . . gave false information by signing Braggs' name, because she is not Braggs." Pet. App. 25. Under the interpretation of the Government and the Court of Appeals, Tyree would have committed a *federal* felony even if

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[3]In fact, after the trial but before the sentencing in this case, Braggs provided a sworn statement that "he gave Tyree permission to cast an absentee ballot for him provided that she voted the ballot for Smith." See App. 22 n.13.

Braggs had been sitting in the room with her and asked her to sign his ballot affidavit because his hands were dirty. That simply cannot be the law.

As we pointed out in the petition, Pet. at 7-10, the question of the seven voters' consent was hotly contested at trial. If the Government's current reading of § 1973i is correct, then the Government's conduct at trial is simply inexplicable. There was no point to the Government's fierce attempts to prove nonconsent: even if each of the voters had gotten on the stand and testified that he or she explicitly directed Petitioners to assist in the application or voting process, Petitioners should still have been convicted.

Perhaps recognizing the bankruptcy of its statutory construction, the Government retreats to the contention that "in any event, even if the government had been required to prove lack of consent, the evidence in this case overwhelmingly established that the victim voters did not consent . . . ." Br. Opp. 21. Once again, the Government has misrepresented the record. There was literally *no* evidence on lack of consent with respect to one voter, Shelton Braggs, whom the Government did not even call as a witness. Two of the other six "victim" voters testified at the trial that they *had* consented. See Tr. 472 (voter Michael Hunter); Tr. 567 (voter Willie C. Carter). A third and a fourth voter were vigorously cross-examined about prior statements given to the FBI or defense counsel that suggested they had consented. Tr. 370, 390, 396, 403 (voter Angela Hill, who was Petitioner Tyree's estranged half-sister); Tr. 540 (voter Cassandra Carter). With respect to yet a fifth voter—Sam Powell—petitioner Tyree was prevented from presenting a witness, Powell's daughter Burnette Hutton, who would have testified that she had signed his voter affidavit with his consent. See Pet. 8-10. And with respect to the sixth voter, Eddie Gilmore, uncontested expert testimony established that he had written his own signature on

his ballot application, Tr. 1025, for which Petitioner Tyree was nonetheless convicted.

Of course, the question before this Court is not whether the voters in fact consented. Petitioners acknowledge that despite the bewildering array of testimony, recantation, and contradictory statements given by the six voters whom the prosecution chose to call, there was sufficient evidence from which a properly instructed jury *could* have concluded that six of the voters did not consent. But for the reasons we explained in our petition for certiorari, this jury was not properly instructed. Pet. 10-11, 14-15, 24-25. Thus, the jury might well have convicted Petitioners on the assumption that even if the voters had consented, Petitioners were nonetheless guilty. The fact that the jury could convict Petitioner Tyree with respect to two counts related to Shelton Braggs (who never appeared in court at all) and one count related to the ballot application of Eddie Gilmore after uncontradicted expert testimony showed that he himself had probably written his own signature on the form simply because she wrote his name, residence, mailing address and county name on the form undermines any suggestion that the jury necessarily concluded that Petitioners acted without the voters' consent.

The Court of Appeals' misconstruction of the substantive criminal statutes that Petitioners were charged with violating thus cannot be neatly excised from this case, as the Government suggests, by hypothesizing that *if* the jury had been properly instructed that lack of voter consent was an essential element of the offenses, it *would have* returned guilty verdicts that *would* find support in the record. Such an argument makes the jury trial itself superfluous, in clear violation of the Sixth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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